Supreme Court, U.S.
FILED
MAY 16 2002
CLERK

No. 01-1526

In the Supreme Court of the United States

ROBERT E. BROWN,
Petitioner,

v.

CITY OF WILMINGTON, MAYOR JIM SILLS, DELDOT, CITY COUNCIL, CITY PLANNING DEPT. AND MBNA BANK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT CITY OF WILMINGTON, MAYOR JIM SILLS, CITY COUNCIL AND CITY PLANNING DEPARTMENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Cireuit rendered a decision which conflicted with the Court's holding in Likey v. United States, 510 U.S. 540 (1994) and Bernofsky v. Tulane University, 962 F. Supp. 895 (E.D. LA. 1997) when it found no basis for recusal of the District Court judge presiding over Petitioner's case.

LIST OF PARTIES

PETITIONER	-	Robert E. Brown
RESPONDENTS	-	City of Wilmington, Mayor Jim Sills, DELDOT, City Council, City Planning Dept and MBNA Bank

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STATEMENT OF THE CASE

The sole issue raised by Petitioner on certiorari centers on whether the United States Court of Appeals for the Third Circuit properly found no basis upon which the District Court judge who presided over Petitioner's case should have recused himself. Petitioner's basis for recusal was the fact that the District Court judge had, or was, presiding over a separate, unrelated matter captioned Spark v. MBNA, C.A. No. 96-497, wherein Respondent MBNA Bank was a party represented by the same attorneys of record as those in Petitioner's matter. Petitioner maintains that the decision rendered by the Court of Appeals on the issue of recusal conflicts with relevant decisions issued by this Court.

Petitioner fails to satisfy any of the criteria under Rule 10 of the Court's Rules of Practice warranting a grant of the Petition.

STATEMENT OF FACTS

On August 13, 1999, Petitioner Robert E. Brown filed a complaint in the United States District Court for the District of Delaware. The complaint was filed against the City of Wilmington, City Council of the City of Wilmington, Mayor James Sills, the City Planning Department, the Delaware Department of Transportation and MBNA Bank. (Pet'r App. pp. 3a-4a).

Petitioner alleged that on July 8, 1993, the City Respondents deleted Chapter 37, §37-95 of the Wilmington City Code, "Regulations of Parking Meters in Downtown", Ordinance No. 93-046. Petitioner further contended that the City Respondents concealed the introduction and passage of Ordinance No. 93-046 from the public. In support of his

position, Petitioner alleged that the City Respondents failed to give notice as required by Title 17, §1302 (b) of the Delaware Code. Petitioner further stated that on September 24, 1998, the City Respondents passed an ordinance instituting "No Parking, Standing or Stopping" on Walnut Street between 9th and 13th Streets located in the City of Wilmington in violation of Title 17, §1302 (a)(b), and Title 29, §§10101, 10115, 10116, 10117 and 10122 of the Delaware Code. (Pet'r App. pp. 4a-5a, 6a-7a).

The United States District Court for the District of Delaware, upon Respondents' motion, dismissed Petitioner's complaint on all grounds for failure to state a claim upon which relief could be granted. (Pet'r App. pp. 3a-7a). On July 5, 2001, Petitioner filed a Writ of Mandamus in the United States Court of Appeals for the Third Circuit, requesting for the first time the recusal of the Honorable Roderick R. McKelvie, the District Court judge who presided over his case. The Court of Appeals properly denied Petitioner's request for a Writ of Mandamus, stating that the relief requested in the petition for mandamus was an issue for the normal appellate process. On August 2, 2001, the Court affirmed the District Court's dismissal of the case and addressed the issue of recusal. On this point, the Court ultimately held that Petitioner's arguments were frivolous and recusal of the presiding judge was not warranted. (Pet'r App. pp. 35a-36a)

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The Rule further explains "the character of the reasons the Court considers" when reviewing a writ. Presumably, Petitioner posits that Rule 10(c) is applicable to this matter in that the decision of the Court of Appeals conflicts with the decisions of this Court in Likey v. United States, 510 U.S. 540 (1994) and Bernofsky v. Tulane University, 962 F. Supp. 895 (E.D. LA. 1997). Rule 10(c) states, in pertinent part, that the Court will consider a writ which has as its basis the argument that "a United States court of appeals... has decided an important federal question in a way that conflicts with relevant decisions of this Court." Petitioner fails to present any compelling reason meeting this standard and erroneously argues a conflict of authority as to the issue raised in the present writ.

A. The Decision of the United States Court of Appeals for the Third Circuit Does Not Conflict with this Court's Holding in Likey v. United States, 510 U.S. 540 (1994).

Petitioner argues that the District Court judge should have recused himself from the matter below captioned Robert Brown; Micro Business Community v. City of Wilmington; Jim Sills, Mayor; DELDOT; City Council for the City of Wlmington; City Planning Dept.; MBNA Bank, D.C. Civ. No. 99-cv-00527. As the basis for his position, Petitioner

states that the District Court judge had, or was, presiding over a separate, unrelated matter captioned Spark v. MBNA, C.A. No. 96-497, wherein Respondent MBNA Bank was a party represented by the same attorneys of record as those in Petitioner's matter. As such, this violates 28 U.S.C. §§ 144 and 455, and Canons 1 and 2 of Judicial Conduct. Although Petitioner cites Likey v. United States, 510 U.S. 540 (1994) as support for his position, the Court's holding in Likey actually contradicts Petitioner's arguments. In Likey, the petitioners argued that the trial judge was required to recuse himself pursuant to 28 U.S.C. § 455 because the judge had displayed "impatience, disregard for the defense and animosity" toward one of the petitioners in a previous trial. Id. at 542. Petitioner made a motion for recusal at the beginning of the trial and at the end of the prosecution's case. The judge denied both motions. The appellate court affirmed the decision.

In upholding the appellate court's decision, this Court in Likey held that the numerous grounds for recusal brought forth by Petitioners were inadequate. "They consist of judicial rulings, routine trial administration efforts, and ordinary admonishments... to witnesses. All occurred in the course of judicial proceedings, and neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible." Id. at 556.

In the present matter, Petitioner failed to comply with 28 U.S.C. § 144 because he did not file an affidavit with the District Court judge stating the reasons he believed the judge was biased. Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350 (3d Cir. 1990); United States v. Martorano, 866 F.2d 62, 67 n.5 (3d Cir. 1989). Furthermore, Petitioner does not allege that the District Court judge in granting Respondents' motion

to dismiss relied upon knowledge acquired outside judicial proceedings. Finally, Petitioner has failed to raise any facts which would indicate a "deep-seated and unequivocal antagonism" on the part of the District Court.

Consistent with the holding in Likey where this Court found no basis for recusal, the Court of Appeals held that Petitioner had not shown that the trial judge's impartiality would be questioned by a reasonable person as required by 28 U.S.C. § 455. (Citing Martorano, *supra*, at 68.) The Court further stated that a "reasonable person would not question the district judge's participation merely because one of the parties, and its attorney, had appeared before him in another case." (Pet'r App. pp. 35a-36a); see also, Sine v. Local No. 992 International Brotherhood of Teamsters, 882 F.2d 913 (4th Cir. 1989)(bias cannot be shown by a judge's decision in another case).

The Court of Appeal's holding in this matter is fully consistent with Likey and prevailing case law on the issue of recusal. See Christo v. Padgett, 223 F.3d 1324 (11th Cir. 2000); Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350 (3d Cir. 1990); United States v. DiPasquale, 864 F.2d 271 (3d Cir. 1988); United States v. Rosenberg, 806 F.2d 1169 (3d Cir. 1986), *cert. denied* 481 U.S. 1070 (1987); Smith v. Danyo, 585 F.2d 83 (3d Cir. 1978). As such, Petitioner has not demonstrated that the Court of Appeals rendered a decision upon an important question of federal law in a manner which conflicts with relevant decisions of this Court. Therefore, the Court should deny the Petition for a Writ of Certiorari in this matter.

B. Bernofsky v. Tulane University, 962 F. Supp. 895 (E.D. LA. 1997), Cited by Petitioner in Support of His Writ of Certiorari, Does Not Apply to Petitioner's Case.

Petitioner alleges that the decision of the Court of Appeals is also inconsistent with Bernofsky v. Tulane University, 962 F. Supp. 895 (E.D. LA. 1997). However, Bernofsky lends no support to Petitioner's contentions.

Bernofsky was not a matter decided by this Court, but rather a decision by the United States District Court for the Eastern District of Louisiana. Furthermore, the court in Bernofsky did not address the issue of recusal of the trial judge. Bernofsky dealt with substantive issues related to a motion for summary judgment in an employment discrimination case. This case has no relevance to Petitioner's argument and is not a basis for this Court to grant the petition at bar. Therefore, the Court should deny the Petition for a Writ of Certiorari in this matter.

CONCLUSION

Given the above, Petitioner has failed to identify a conflict of authority on an important federal question. As such, the Petition should be denied.

Respectfully Submitted,

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